UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WYNNE CALVERT, Plaintiff, v. BODO W. REINISCH and JAMES L. BURCH, Defendants.	))))))))	CIVIL ACTION NO. 02-10307-DPW

MEMORANDUM AND ORDER
July 13, 2004

Before me in this contract dispute are defendants' motions for summary judgment. Pursuant to 28 U.S.C. § 636(b)(1)(B), I referred the motions to Chief Magistrate Judge Bowler, who issued a report ("Report") recommending that they be granted in part and denied in part. In response, the plaintiff and both defendants have filed objections to the Report. After considering these objections, hearing oral argument, and entertaining supplemental submissions, I conclude that the recommendations contained in the Magistrate's Report are correct and they will be adopted as Orders of this Court.

I. BACKGROUND

A. Facts

In the Report, Magistrate Judge Bowler provided an extensive recitation of the background facts. See Report at 1-23. I need for present purposes to provide only a very brief background summary. Except where specifically objected to, as set forth

below, the facts are undisputed by the parties.

This case arises from a scientific project under the auspices of the National Aeronautical and Space Administration ("NASA"). The fundamental source of the dispute lies in the tension between, on the one hand, how NASA formally deals with research scientists and the institutions that employ them, and on the other hand, custom and practice in the scientific community.

Plaintiff Wynne Calvert, a research scientist, worked at the University of Iowa in 1992 when NASA convened a group to explore radio sounding of the magnetosphere. The group, which included both Calvert and defendant Bodo W. Reinisch, spent the next two years promoting the idea of radio sounding and advancing the idea of conducting plasma imaging experiments aboard a NASA spacecraft. During those two years, Calvert invented a new method for measuring plasma structures in the magnetosphere. The group -- which called itself the Radio Plasma Imager ("RPI") team -- at this point had no outside financing, formal institutional structure, or specific proposals for NASA.

In 1994 Calvert and other RPI team members approached defendant James L. Burch, Vice President of the Instrumentation and Space Research Division at Southwest Research Institute ("SwRI") in San Antonio, Texas. The purpose of their visit was to explore joining a proposed SwRI satellite project, known as the Imager for Magnetopause-to-Aurora Exploration ("IMAGE") investigation, involving various magnetospheric studies. Burch agreed to make RPI a component of the larger IMAGE project.

In March 1995 NASA issued a call for proposals for research projects for the upcoming "MIDEX" satellite mission. NASA used a two-step process to narrow the initial number of proposals to two projects that would take place on the MIDEX mission. The RPI team, now including Burch, met in San Antonio several times, along with scientists working on other sub-projects within the larger IMAGE project. The purpose of the meetings was to "plan the mission in detail and to begin preparation of a formal proposal."

Under NASA regulations, the step one proposal is submitted by the Principal Investigator ("PI") under the institutional and financial sponsorship of his institution; NASA deals only with institutions for fiduciary reasons. For the larger IMAGE step one proposal submitted June 27, 1995, Burch was the PI and hence SwRI was the sponsoring institution. The proposal listed Reinisch as a "co-investigator" in charge of RPI design and flight integration -- in essence, PI of the smaller RPI sub-project. Under the proposal, all NASA funds would go to SwRI, which would in turn subcontract with the employing institutions of co-investigators for the sub-projects; those institutions would in turn relay money to the individual institutions of the various scientists working on the sub-project. In the case of RPI, SwRI would subcontract with the University of Massachusetts at Lowell ("UML"), where Reinisch worked, to implement the RPI project; UML was, in turn, to direct the funding for Calvert's work to the University of Iowa, where Calvert was then employed.

As for the participating scientists, Burch (as PI) and Reinisch (as RPI co-investigator) had the "final responsibility" for determining whether a participating RPI scientist was performing adequately.

While the proposal and contractual arrangements are quite clearly between NASA and various institutions, and among the institutions themselves, custom and practice in the scientific community provides the environment for the formal institutional arrangements. According to scientific custom as set forth by Calvert and his expert, when a group of scientists submits a proposal to NASA, the scientists form an implied agreement among themselves. Each participating scientist, by agreeing to work on a proposal for NASA and putting his name on that proposal, is expected to do certain work preparatory to the creation of that proposal, and to do the stated work if the proposal is accepted. In return, he expects that, if the proposal is accepted, he (rather than another scientist) will receive the work and the funding that goes with it. Customarily, and unless specifically agreed otherwise, scientists expect to participate for the life of the project (or the portion of it which they agree to work on) and any subsequent extensions. Furthermore, if a scientist changes institutions midway through a project, the grant follows him with only a "routine formality" of approval by the funding agency. Defendants do not agree that this is the scientific custom or that participating scientists enter into implied agreements.

In August 1995 NASA chose the IMAGE proposal to proceed to step two, and the RPI team spent the next four months preparing a more detailed step two proposal which it submitted in December 1995. The step two proposal included $720,000 for Calvert's work, including $450,000 for mission operations and data analysis ("MO&DA"). The money was to be transferred to Calvert through a subcontract between UML and the University of Iowa.

In April 1996 NASA selected the IMAGE proposal (including RPI) as one of two projects for its MIDEX satellite mission. NASA and SwRI executed a contract for the early phases of the IMAGE project, and SwRI and UML executed a subcontract for the early phases of the RPI subproject. The SwRI-UML subcontract was expressly limited to preliminary RPI design, but could be extended. Calvert remained in Iowa, and would mainly interact with Massachusetts-based RPI team members.

Soon afterwards, the University of Iowa terminated Calvert. Because NASA required funding to go to institutions, not people, an institutional home had to be found for Calvert. By custom and practice in the scientific community, in such situations the parties try to arrange for a scientist's employment at another institution to ensure his continued participation in the project. Consequently, Reinisch arranged for UML to hire Calvert in the summer of 1996.[1] Calvert contends that he and Reinisch also reached a "side agreement" to perform additional work beyond that

[1]Calvert did not move to Massachusetts, but rather remained based in Iowa and traveled to Massachusetts as necessary.

originally scheduled, and to fund Calvert's annual UML salary of $80,000 fully.

In the fall of 1997, however, Reinisch came to conclude that "Calvert was not working well as a team member." In December 1997, UML (at Reinisch's recommendation) changed the terms of Calvert's UML employment to a consulting arrangement through the pre-launch phase (lasting until January 2000) and the three year MO&DA phase. Calvert was not satisfied with this proposal because the amount that Reinisch offered to pay him was allegedly less than he and Reinisch had originally agreed, and because of other concerns with the proposed consulting agreement. Reinisch then terminated Calvert's additional work and stated that Calvert would only perform the original work. In August 1998 UML rescinded its offer of the consulting agreement and terminated Calvert.

B. The Report and Recommendation

In her Report, Chief Magistrate Judge Bowler first addressed a choice of law dispute between Reinisch and Calvert,[2] and found that, there being no relevant difference between Texas law (which Calvert pressed) and Massachusetts law (which Reinisch pressed), it was unnecessary to resolve the dispute. Report at 24-26.

Next, she turned to Count I, alleging a breach of partnership. She analyzed the claim under both Texas and Massachusetts law, and found that under either body of law there was insufficient evidence to support the establishment of a

[2]Burch agreed with Calvert's choice of Texas law.

partnership or joint venture. Id. at 26-37. The key element under either state's law is an association of persons as co-owners of "'a business for profit.'" Id. at 27 (quoting Tex. Rev. Civ. Stat. art. 6132b-2.02(a)), 32 (quoting Mass. Gen. Laws ch. 108A, § 6). Furthermore, a partnership or joint venture also requires a mutual right of control or management of the enterprise. Id. at 28, 31 (citing Texas law), 33-34 (citing Massachusetts law). Magistrate Judge Bowler found that the summary judgment record did not contain sufficient evidence to support either requirement. Id. at 29-32 (applying Texas law), 35-37 (applying Massachusetts law). She therefore recommended that summary judgment be granted on Count I.

Finally, she turned to Count II, alleging breach of contract. She found that there was sufficient evidence upon which a jury could find that Calvert, Reinisch, and Burch formed an implied in fact contract. Under this alleged contract, Calvert agreed to contribute his name and research to the proposals, to assist in development of the proposals themselves, and to engage in certain work (designing the RPI software and measurement technique, and analyzing data in the MO&DA phase) if NASA approved the IMAGE project; in turn, Reinisch and Burch agreed that Calvert would perform this work and be funded for it. Id. at 40.

Magistrate Judge Bowler rejected, for summary judgment purposes, Reinisch's defense that his actions were all as a

disclosed agent for a disclosed principal (UML).[3] She found that there was a genuine issue of fact as to whether Reinisch, in his individual capacity, had an implied in fact contract with Calvert to participate in the RPI portion of the IMAGE project if NASA chose the IMAGE project. Id. at 44.

She also rejected Burch's defense based on the statute of frauds.[4] Under the statute of frauds, an agreement that cannot be performed within one year from the date of the parties' undertaking cannot be enforced without a writing signed by the alleged promisor; conversely, an agreement that can be performed within one year does not require such a writing. Id. at 45-46 (Texas law), 51 (Massachusetts law). An agreement that can be terminated within one year based on the occurrence of a condition presents a somewhat different analysis. If termination completes the performance, then the possibility of termination within one year puts the agreement outside the statute's scope, i.e., enforceable without a writing. If, on the other hand,

---

[3]Evidently UML was not a named defendant because it would have a sovereign immunity defense. Reinisch argues that he enjoys the benefit of UML's sovereign immunity. However, this defense is only relevant if Reinisch was acting solely as UML's agent, in which case he would not need the defense because he would not be individually liable.

[4]Reinisch attempted belatedly to join in this defense, but Magistrate Judge Bowler did not allow him to raise the issue at summary judgment because he failed to plead it as an affirmative defense in his answer. Reinisch can, of course, move to amend his answer to incorporate this defense. In particular, I note that the separate "side agreement" that Reinisch and Calvert allegedly entered into in the summer of 1996 may independently fall within the statute of frauds. Because that issue is not before me, I do not address it at this time.

termination excuses non-performance, then the mere possibility of termination within one year does not remove the agreement from the statute's scope. Id. at 46-49.

Magistrate Judge Bowler found that, viewing the record in Calvert's favor, a jury could find that the parties agreed that Calvert would perform for the life of the project. Id. at 49-51. The project, under this view, would not refer just to the RPI portion of the IMAGE project as eventually accepted by NASA, but also to the preparatory work involved in creating the proposal. Although Calvert's preparatory work would not be NASA-funded, it would not be gratuitous either; in essence, his work done before NASA started actually funding the RPI team would be in consideration for the RPI team guaranteeing that Calvert, and not someone else, would be awarded the work that the parties understood he would do -- principally, designing the RPI software and measurement technique, and analyzing data in the MO&DA phase.

Under this view, Magistrate Judge Bowler found, if NASA were to have rejected the IMAGE proposal, the "life of the project" would have been less than one year; conversely, if NASA accepted the IMAGE proposal (as it did), the life of the project would be much longer than one year. Because the possibility of performance within one year removes the agreement from the statute of frauds regardless of what actually happened, it follows that if a jury found the terms of the agreement as Calvert alleged, then it would be enforceable even without a writing. Magistrate Judge Bowler found a genuine dispute on the

terms of the implied in fact contract involving Burch, Calvert, and Reinisch, and therefore denied the statute of frauds defense for summary judgment purposes. Id. at 49-50.

Finally, Magistrate Judge Bowler rejected defendants' argument that the agreement is void because it violates public policy. Id. at 51-58. Defendants argued that, even if the scientists had formed an agreement in their individual capacities, it would run counter to NASA's regulatory scheme for research contracts. No NASA regulation expressly prohibits contracts among scientists, acting as individuals, in the course of preparing a NASA proposal. Id. at 52 n.41. However, defendants argue that several sources, taken together, express an important public policy that NASA contracts be made through an institution: NASA's Guidelines for Acquisition of Investigations ("Guidelines"), 48 C.F.R. § 1870.1 Appendix I (1995); the MIDEX announcement of opportunity; and a quotation from the "Frequently Asked Questions" section of a NASA research announcement guidebook. Id. at 54-57. Magistrate Judge Bowler found that the portions of those sources relied upon by defendants -- which essentially state that NASA requires institutional sponsorship and subcontracting for its projects -- do not evince a federal policy against scientists independently contracting in their individual capacities to present and implement a proposal. Furthermore, she found that other portions of those sources, particularly the Guidelines, "recognize the importance of the PI, his relationship to co-investigators and the formation of teams

among a group of investigators as opposed to institutions." Id. at 55. Given that NASA was well aware of prevailing scientific custom, Magistrate Judge Bowler found, the cited NASA documents were actually entirely consistent, permitting a parallel contracting track under which scientists would agree amongst themselves to submit (and, if fortunate enough to be selected, implement) a proposal, while NASA itself would formally contract with institutions only. Id. at 54-58.

C. Objections to the Report

Calvert objects to the Report on eight grounds. Grounds 1-6 are minor disputes about factual details that could not change the disposition of the motions, and I therefore decline to address them on the merits.[5] Ground Seven objects to the Report's conclusion that, while Reinisch was acting at least in part as a disclosed agent of UML, there is a dispute of fact as to whether he was also acting in his individual capacity. Calvert objects insofar as Magistrate Judge Bowler assumed that Reinisch was acting at all as an agent for UML. Ground Eight

[5]Ground One (which Calvert acknowledges "may be [] legally immaterial") states that "Burch was not regarded as part of the RPI team" but was rather part of the larger IMAGE team. Ground Two asserts that Calvert attended the initial 1992 organizational meeting of the RPI team. Ground Three relates to an apparent, possibly illusory, and probably irrelevant contradiction between Calvert's statement and that of his expert as to, by custom, when individual scientists form an agreement. Grounds Four and Five object to characterizations of UML's hiring and firing of Calvert as recommended by Reinisch when, Calvert asserts, they were "directed" by Reinisch. Ground Six seeks to correct an apparent typographical error deriving from a transcription error in deposition testimony.

asks me to clarify that Calvert's motion to strike testimony of an undisclosed witness (Anderson) and of a previously undisclosed document, which Magistrate Judge Bowler recommended denying as moot, is denied without prejudice to its reassertion by motion in limine or at trial. In a scheduling conference accompanying the hearing on objections to the Report and Recommendation, I resolved Ground Eight by affording a period of time for discovery on the topic.

Burch objects to the Report's conclusions that (1) the NASA regulations requiring scientists to participate in projects through formal, disclosed institutional arrangements do not render any side contracts among individual scientists void as against public policy, because (Burch argues) there is an obvious potential for conflicts in allowing two sets of side-by-side obligations governing the same activities of the same actors, and (2) NASA's rejection of the IMAGE proposal could result in complete performance within a year, because (Burch argues) NASA's acceptance was a condition that, if it did not occur, would excuse non-performance, rather than result in complete performance.

For his part, Reinisch objects to the Report's findings that there are genuine issues of material fact concerning (1) whether Reinisch acted, at least in part, in his individual capacity, and (2) whether there was a contract between Reinisch and Calvert, when (Reinisch asserts) any agreement Reinisch entered into would have been on behalf of UML.

II. DISCUSSION

A. Standard of Review

A district judge may designate a magistrate judge to conduct hearings and submit to the district court proposed findings of fact and recommendations for the disposition of pretrial motions, including motions for summary judgment. 28 U.S.C. § 636(b)(1)(B). A party may obtain review of a magistrate's report and recommendation by filing an objection in the district court. Id. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). The district court applies a de novo standard of review, which does not require a new hearing. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b); D. Mass. L. Mag. R. 3(b); see also Mathews v. Weber, 423 U.S. 261 (1976). The district court may accept, reject or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1); see Paterson-Leitch v. Mass. Muni. Wholesale Elec. Co., 840 F.2d 985, 990-991 (1st Cir. 1988).

Review of the magistrate's report and recommendation, while de novo, does not require starting from scratch; rather, the district court need only review those aspects of the report and recommendation objected to by the parties. See Santiago v. Cannon U.S.A., Inc., 138 F.3d 1, 4 (1st Cir. 1998) ("The district court is under no obligation to discover or articulate new legal theories for a party challenging a report and recommendation issued by a magistrate judge."); Paterson-Leitch, 840 F.2d at 990-91.

Analysis

1. Public Policy

The principal issue presented by defendants' public policy contention is not whether NASA intended to prevent scientists from entering into agreements amongst themselves concerning proposals for NASA projects, but rather whether judicially enforcing such agreements would endanger NASA's carefully designed contracting scheme.[6]

A contract may be rendered unenforceable by a conflict with a public policy that is "'explicit,' 'well defined,' and 'dominant.'" E. Assoc. Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000) (quoting W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 766 (1983));[7] accord Lawrence v. CDB Servs., Inc., 44

---

[6]Of course, agreements can still have value even if they are not judicially enforceable. For instance, in a closely knit community -- perhaps the relevant scientific community here is one -- violation of an agreement can lead to informal sanctions such as loss of professional credibility.

[7]Magistrate Judge Bowler found Eastern Associated inapplicable because it involved an arbitration award concerning a collective bargaining agreement. Report at 53 n.42. However, Eastern Associated relied for this point on W.R. Grace, which in turn stated that "[a]s with any contract, however, a court may not enforce a collective-bargaining agreement that is contrary to public policy" before reaching the relevant point:

> If the contract . . . violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'

461 U.S. at 769 (emphasis added) (quoting Muschany v. United

S.W.3d 544, 545 (Tex. 2001) (refusing to hold contracts void on public policy grounds without "clear indication of legislative intent to prohibit such agreements"); but see Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 422 Mass. 318, 321 (1996) ("'Public policy'. . . refers to a court's conviction, grounded in legislation and precedent, that denying enforcement of a contractual term is necessary to protect some aspect of the public welfare."); Adams v. E. Boston Co., 236 Mass. 121, 128 (1920) ("The test is whether the underlying tendency of the contract . . . was manifestly injurious to the public interest and welfare.").[8]

The problem for defendants is that NASA's policies requiring NASA to interact formally with institutions (and for those institutions to interact formally with other institutions) do not necessarily prevent scientists from interacting with one another in a different fashion. The record contains ample evidence -- including from a former Administrator of NASA, Calvert's expert Dr. Robert Frosch -- supporting the view that NASA is well aware of how scientists collaborate individually on research proposals.

States, 324 U.S. 49, 66 (1945)). Muschany, in turn, involved a contract for the purchase of land from the United States. Therefore, Eastern Associated is relevant for the point (which Magistrate Judge Bowler acknowledged) that the public policy must be "explicit," "well defined," and "dominant."

[8]The Massachusetts standard for the clarity of a public policy appears to be different from those used by Texas or the federal system. Without deciding which standard applies here, I note that this difference is not outcome-dispositive in this case because defendants have not shown that the alleged contract was "manifestly injurious" to the public welfare.

See Report at 9 & n.8, 10, 55-56. If NASA wished to discourage such a widespread practice, a few words would have easily sufficed.

Burch points out that allowing a parallel agreement among scientists could create a conflict between the PI's obligations to NASA and his obligations to the individual scientists. Indeed, this case is arguably an example of just such a conflict. But such conflicts are hardly unknown to the law (or to more familiar practice outside the world of science), nor do they typically require invocation of extraordinary legal doctrines such as voidness as against public policy. Consider, merely as a more pedestrian and familiar hypothetical, a general contractor's simultaneous (and potentially conflicting) legal obligations to the hiring party and to the subcontractors. This case is not exactly analogous, but the same general point applies: The mere fact that a PI could have parallel and arguably conflicting obligations does not mean that one of the obligations cannot be pressed in a court of law. It simply means that the PI must be careful when selecting participating scientists and when deciding whether to terminate them.

NASA has no clear public policy rendering oral agreements of the type Calvert alleges unenforceable. The record indicates that NASA was aware of such agreements, to some extent assumed that scientists would enter into them, and even facilitated their enforcement to a degree by routinely approving transfer of subcontracts when individual scientists changed institutional

affiliation. I will therefore adopt the Report's recommendation that defendants' motion for summary judgment on public policy grounds be denied.

2. Statute of Frauds

The main question regarding the statute of frauds contention is whether, under the alleged agreement, NASA's failure to accept the IMAGE proposal would have meant that the agreement was fully performed, or that it was terminated and nonperformance by all parties excused. The Report concluded that, given the genuine dispute surrounding the terms of the implied in fact contract, a jury could find that the terms of the agreement were structured such that NASA's failure to accept the IMAGE proposal would mean that the agreement was fully performed. Burch argues that, under the facts as Magistrate Judge Bowler found them and as a matter of law, NASA's acceptance of the proposal was a condition (whether precedent or subsequent) the nonoccurrence of which would result in excusable nonperformance, not full performance. For his part, Calvert, in addition to defending the Report, also argues that, even if the agreement is within the statute of frauds, the statute is satisfied by part performance and/or various signed writings.

The first task is to ascertain what a jury might reasonably find the terms of the agreement to be. As a predicate to that undertaking, it is important to recognize that very subtle differences in contract phraseology can result in radically different outcomes under the statute of frauds. In the leading

Texas case, Gilliam v. Kouchoucos, 340 S.W.2d 27 (Tex. 1960), the Texas Supreme Court quoted with approval Professor Williston's typology of promises containing death contingencies:

> The distinction doubtless is a fine one between the performance of a promise on the one hand, and an excuse for non-performance on the other, especially when under the heading of excuse for non-performance must be included an excuse provided by the contract itself by way of defeasance or condition subsequent. . . . That the form of the contract may be involved in this distinction is demonstrated by the following illustrative cases:
>
> > 1. A promise to serve two years;
> > 2. A promise to serve as long as the employee lives, not exceeding two years;
> > 3. A promise to serve two years if the promisor lives so long;
> > 4. A promise to serve two years, but if the promisor dies the contract shall be terminated.
>
> It is obvious that all these promises have substantially the same meaning and, if enforceable, the same legal effect; yet certainly the first promise, and presumably the fourth, are within the Statute, while certainly the second and presumably the third are not.

Gilliam, 340 S.W.2d at 29 (quoting Williston on Contracts § 499 (3d ed. 1960)) (internal quotation marks omitted). These highly refined distinctions illustrate that, in order to apply the statute of frauds at summary judgment, the court must determine as a matter of law not just the rough outline of the agreement's terms, but the precise wording that a jury could reasonably find. Only if every possible phrasing of the agreement that a jury might reasonably find would place the agreement within the statute may the court grant summary judgment on this basis. This may appear hypertechnical, but as an earlier Texas case (cited by

Professor Williston) noted, "[t]o the criticism that the distinction is more technical than substantial, it may well be answered that the ancient statute is itself rather technically worded." Chevalier v. Lane's, Inc., 213 S.W.2d 530, 532 (Tex. 1948).

With the above typology in mind, I find that a jury could reasonably find the following potential agreements in this case:

1. A promise to serve for the life of the IMAGE project;
2. A promise to serve for the life of the IMAGE project, if NASA selects the IMAGE project for the MIDEX mission;
3. A promise to serve for the life of the IMAGE project, but if NASA does not select the IMAGE project for the MIDEX mission, then the agreement will be terminated;
4. A promise that, if NASA selects the IMAGE project for the MIDEX mission, then the parties will serve for the life of the IMAGE mission.

Note in particular that the first three versions refer solely to the IMAGE "project" whereas the last includes reference to the IMAGE "mission." I mean in this typology to distinguish the IMAGE project, as the RPI team evidently viewed it -- which began (for the scientists) well before NASA made any formal decisions -- from the IMAGE mission, as NASA viewed it -- which began after NASA formally selected IMAGE as a primary mission for the MIDEX satellite mission.[9] The parties clearly expected to

[9]Magistrate Judge Bowler found that the implied in fact contract, if it existed, was formed in or around October 1995, which would mean that "proposal" stage work would only apply to the step two proposal. Report at 49. I conclude that a jury could find that the relevant agreement had been formed as early as March 1995, when the RPI team began planning the mission in detail and working on a step one proposal.

(and did in fact) perform uncompensated work necessary to prepare a formal proposal for NASA.[10] A jury could quite reasonably find that Calvert (like other RPI scientists) performed this unfunded work in consideration for allocation of any future funded work to him personally. Moreover, even if NASA did not select IMAGE, the life of the "project" from the RPI scientists' perspective could be relatively well-defined as beginning when they started preparatory work and ending when NASA rejected the proposal.

Viewing these four possibilities in light of Gilliam, it is apparent that the first possibility ("A promise to serve for the life of the IMAGE project"), which contains no conditions (precedent or subsequent), could be performed entirely within one year. In essence, Calvert would be promising to work (and defendants would be promising to allow him to work) for as long as there was an IMAGE project. The project could conclude with the submission of a proposal that was not selected by NASA for further advancement, or it could be selected by NASA and turn into something much larger. To draw again from more familiar examples, consider an attorney who agrees to assist in a potential real estate deal. The attorney's involvement might end with the submission of a bid that was ultimately rejected, or could continue through execution of a purchase contract, deed of sale, and perhaps even zoning applications for further development. But it is easily conceivable that working for the

[10]See Report at 6-10, 15-17.

"life of the deal" could be fully performed if the deal died young, within a year. This is, in fact, what Magistrate Judge Bowler concluded that a jury could find regarding the IMAGE project. Report at 49.

Burch's arguments all rest on the assumption that the agreement must have included a condition precedent (such as the second or fourth possibility above) or a condition subsequent (such as the third possibility above). He argues that Calvert had no tasks that could be performed unless NASA selected IMAGE as a primary mission for the MIDEX mission; but this is clearly contrary to the record.

In particular, a jury could reasonably find that, before April 12, 1996 (the date on which NASA informed Burch that IMAGE had been selected), Calvert, having invented a new technique for measuring magnetospheric plasma structures by sound and echo delay which became "[t]he basic design of the RPI" and traveled to San Antonio to try to persuade Burch to allow the RPI project to become part of the IMAGE proposal, then traveled to San Antonio at least once between March 1995 and June 1995 to "plan the mission in detail" and "begin preparation of a formal [step one] proposal"; otherwise "assist[ed] in developing" the RPI portion of the step one IMAGE proposal; for the step two proposal, helped prepare a $720,000 budget for his work over the life of the IMAGE project; and prepared a proposal to UML for $68,000 for the initial phases. See Report at 6-10, 15-17. All of this work could be found to have been done in exchange for the

promise that, if NASA selected the IMAGE proposal, Calvert (and not someone else) would perform (and be paid for) the work that the IMAGE proposal assigned to him. The parties could reasonably have understood that, had Calvert failed to meet any of his obligations at this stage, he would lose his spot on the RPI team and not be included in the final proposal. The parties could also reasonably have understood that if NASA did not select the IMAGE proposal, then the disappointed RPI team would wrap up or disband or move on to other projects, considering its work on the IMAGE project to be done.

To be sure, Calvert's complaint does not advance precisely this theory. Rather, it alleges that "individual scientists . . . agreed to enter into whatever contractual formalities were required by NASA to carry out their individual participation in the seven year Image mission," and "[t]he proposal to NASA, coupled with all the work that had gone before it, sets forth the agreement of Reinisch, Burch and the Plaintiff with respect to carrying out the seven-year satellite project." Complaint ¶¶ 17, 20 (emphases added).

However, these allegations -- read in the light most favorable to Calvert -- do not necessarily contradict the "life of the project" scenario which could take his actual agreement outside the statute of frauds. No one disputes that the "Image mission" or the "satellite project," as understood by NASA, were to last seven years. Nevertheless, the "project" from the scientists' perspective began earlier, and (had NASA not selected

IMAGE for the MIDEX satellite) could have ended much earlier. Put differently, had NASA not selected the IMAGE proposal, then the IMAGE "mission" would have lasted zero years. A jury could find that the relevant agreement was formed by incorporation of the RPI team in the proposal at step one (in 1995) or step two (in 1996). If the agreement was formed less than one year before the step two decision deadline, then the RPI project, if interpreted by the jury to mean "preparation of a detailed proposal and whatever else, if anything, may follow," could have been completely performed within one year.

Because a jury could reasonably find the alleged agreement to contain terms that would allow for at least one mode of performance within one year, Magistrate Judge Bowler found it unnecessary to consider certain alternative reasons why a jury might find facts indicating that the statute of limitations does not apply. I note, however, that Calvert's work between the spring of 1996 and August 1998 might be found to constitute partial performance in satisfaction of the statute.[11] In order to meet the partial performance exception to the statute of frauds, Calvert's pre-proposal submission efforts must have been "'unequivocally referable to the agreement and corroborative of the fact that a contract actually was made.'" Exxon Corp. v. Breezevale, Ltd., 82 S.W.3d 429, 439 (Tex. App. 2002) (quoting Wiley v. Bertelsen, 770 S.W.2d 878, 882 (Tex. App. 1989))

[11]Magistrate Judge Bowler did not reach this point in her Report and hence I lack the benefit of her analysis.

(emphasis added), rev. denied (June 12, 2003). "The acts of performance relied upon . . . must be such as could have been done with no other design than to fulfill the particular agreement sought to be enforced." Exxon, 82 S.W.3d at 439-40 (emphasis added).

Much of Calvert's RPI-related scientific work could, of course, be attributed to his ordinary employment as a research scientist, and therefore would not evidence fulfillment of the oral agreement among scientists. See Rodriguez v. Klein, 960 S.W.2d 179, 186 (Tex. App. 1997) (where party's performance was required under any one of three agreements, it could not unequivocally refer to the alleged oral agreement). However, a jury could reasonably find here that at least some of the work that Calvert did was very specific to developing the RPI/IMAGE proposal for NASA, as opposed to radio plasma imaging in general, or even pursuit of funding for radio plasma imaging in general.

For these reasons, I will adopt the Report's recommendation that Burch's motion for summary judgment on statute of frauds grounds be denied.

3. Reinisch's Agency

It is clear that many of Reinisch's promises to Calvert – e.g., to relay money to him from UML through the University of Iowa, and to secure employment for him at UML when he lost his University of Iowa position -- were purely as a disclosed agent of UML. The question is whether he also made personal agreements with Calvert in his individual capacity. Magistrate Judge Bowler

found, and I agree, that the evidence suggesting that Reinisch did so, if believed by the jury, is sufficient to bar entry of summary judgment. See Report at 43 & n.31.

Once we assume that there was an oral agreement preceding the submission of the step two IMAGE proposal by which Reinisch agreed (perhaps implicitly) that Calvert would work on the RPI project for its duration, it is not unreasonable for a juror to find that Reinisch made these promises on his own, not on behalf of UML. Burch agreed that if Reinisch for any reason moved to a different institution during the IMAGE project, Burch would cancel the UML contract and enter into a new subcontract with the sponsoring institution, assuming it had the infrastructure necessary to support his work. Report at 19; Burch Dep. (Mar. 23, 2001), Calvert v. Reinisch, No. 2000-CI-16443 (Tex. Dist. Ct.), at 6-7.[12] The fact that Reinisch could leave UML and take the RPI project with him, while UML could not take the RPI project away from Reinisch, suggests that Reinisch was for some purposes the true principal. Put more simply, the dog wags the tail, not the other way around; the jury must determine which was which.

---

[12]The relevance of this testimony is not that it would apply ipso facto to Calvert –- indeed, Burch's statement was partly based on Reinisch's status as "key personnel" on the IMAGE project -- but rather as it applies to Reinisch himself. It is evidence that in some sense the RPI project was Reinisch's, not UML's, and could contribute to a reasonable inference that Reinisch acted, at least in part, on his own authority.

In this light, Reinisch's alleged unwritten agreement with Calvert -- that Calvert would work on the design of the RPI software, measurement techniques, and data analysis for the duration of the project -- was arguably not strictly on behalf of UML. Surely the parties expected that, had Reinisch left UML and taken the RPI work with him, Calvert would have continued to work with Reinisch at his new institution, rather than continue to work at UML on some project having nothing to do with RPI. Indeed, UML had little or no interest in Calvert other than through Reinisch's project.

In short, it makes no more sense to say that Reinisch's oral implied promise (that Calvert would receive a certain amount of work for the RPI project) was really just a promise on behalf of UML than to say that Calvert's oral implied promise (that he would perform that work) was really just a promise on behalf of the University of Iowa. Reinisch reasonably expected Calvert, not his university, to perform; Calvert expected the same of Reinisch.

Of course, whether an agreement of the kind alleged even existed is open to dispute. But if it existed, a jury could reasonably conclude that Reinisch agreed to it at least partly on his own behalf, not solely on behalf of UML. Consequently, I will adopt the Report's recommendation that Reinisch's motion for summary judgment on disclosed agency grounds be denied.[13]

---

[13]Burch also mentioned an agency defense in passing in his summary judgment memorandum, but did not raise it again in his

III. CONCLUSION

For the reasons set forth more fully above, I adopt the recommendations of the Report. Defendants' motions for summary judgment are GRANTED on Count I (breach of partnership) and DENIED on Count II (breach of contract). Plaintiff's motion to strike is DENIED.

/s/ Douglas P. Woodlock

_____
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

---

objections to the Report. Hence, I deem it waived for summary judgment purposes. See Santiago, 138 F.3d at 4.